No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS W. HENNESSY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court violated the petitioner's Fourth Amendment rights when it found the specific basis of the officers testimony justifying the search and seizure to be implausible and thereafter through speculation and conjecture found facts, not in the record, to support said search and seizure.

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OPINIONS BELOW

There is no citation of the opinion of which review is sought since the court below ordered that the opinion was not to be published in the official reports. A copy of said opinion is attached hereto in the appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 USC section 1257 (3) on the ground that his rights under the fourth amendment to the U.S Constitution were violated.

The California Court of Appeal entered its order

rejecting petitioner's fourth amendment claim on August 14, 1995.

The California Supreme Court denied a hearing in this case on November 1, 1995. The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF CASE

This petitioner appealed a Los Angeles County Superior Court denial of a Motion to Suppress evidence pursuant to California Penal Code §1538.5. The issued to be tested by said motion was whether the search without warrant violated the petitioners rights against unlawful search and seizure as guaranteed by the fourth amendment to the United States Constitution.

The motion was heard before the Honorable Robert Simpson, Jr. in the Los Angeles County Superior Court, Southeast District, Department "N" and a ruling denying said motion was made on the 27th of July, 1994.

On October 5, 1994, petitioner was sentenced for violating the following California Code Sections:

Health and Safety Code §11378, a felony for possessing a controlled substance for sale;
Penal Code §12025(a), a misdemeanor for carrying a concealed weapon, and;
Penal Code §12031, a misdemeanor for carrying a loaded firearm in a public place. (An exact copy of these sections are contained in Appendix "D".)

On October 5, 1994, petitioner filed his notice of appeal.

On August 14, 1995 the Court of Appeal of the State of California, Second Appellate District affirmed the denial of the §1538.5 motion. (See appendix "A".)

On September 25, 1995 the petitioner filed a Petition for Review with the Supreme Court of the State of California.

On November October 31, 1995 the California Supreme Court denied a hearing on said Petition. (See Appendix "B".)

On or about December 29, 1993 at approximately 11:40 a.m. a Los Angeles County Deputy Sheriff named Steven Kenny, made a traffic stop on petitioner. Said traffic stop was made because Mr. Kenny observed a pair of dice hanging from the rear view mirror of the vehicle driven by petitioner. Mr. Kenny believed that said dice violated California Vehicle Code §26708, subdivision (a). (RT, page 10, line 21, to page 11, line 2. Copies of the pages in the Reporters transcript cited in the Petition shall be contained in Appendix "C".)

As Deputy Kenny approached the vehicle from the drivers side he noticed that appellant's hand was down and out of his view and when he looked down to the location that the left hand was he observed a small handgun protruding from a pouch in the door. (RT, page 11, line 21, to page 12 line 7.)

Because he had observed the gun, Officer Kenny testified, he ordered the appellant from the vehicle, put him in the radio car and recovered the gun. (RT, page 34, lines 4 through 8.)

The officer then found a small 22. caliber handgun. (RT, page 12, lines 8 and 9.) Said handgun was 4 inches long. (RT, page 68, lines 3 through 10.) Upon further search the deputy found a brown eyeglass case which was located in the driver side door panel and contained methamphetamine. (RT, page 12, lines 15 through line 23.) The officer failed to confiscate the dice as evidence of the original infraction. (RT, page 68, lines 21 through 23.)

After hearing testimony from investigators for Mr. Hennessy, the court found that the preponderance of the evidence in the case was that the officer could not see the gun from outside the car. (RT, page 100, lines 10 through 14.) The investigators also demonstrated on video tape that no part of a 38. caliber revolver with a six inch barrel, placed into the pouch that the officer testified to would be visible to an observer either inside or outside the car because the pouch closes on it. (RT, page 51, line 12 to page 52, line 28.) Further expert testimony described the pouch as 12 inches long and 6 to 6 ½ inches deep. (RT, page 59, lines 3 through 18.)

The court then went on to determine that what the officer testified to, ie. Mr. Hennessy's left hand was out of his view as the officer approached the vehicle, resulted in a reasonable conclusion by the officer that said conduct was furtive, and gave the officer the right to ask Mr. Hennessy to exit the vehicle. The court further found that the gun was observed when the door was opened. (RT, page 101, lines 14 through line 25.)

REASONS FOR GRANTING WRIT

I.

WHEN DENYING A MOTION TO SUPPRESS, THE TRIER OF FACT, AFTER MAKING A FINDING THAT TESTIMONY JUSTIFYING THE SEARCH WAS NOT SUPPORTED BY THE EVIDENCE, SHOULD NOT BE PERMITTED TO SUBSTITUTE UNSUPPORTED SUPPOSITION AND/OR CONJECTURE TO DENY THE APPELLANT OF HIS FOURTH AMENDMENT GUARANTEES.

A. THERE WAS NO PROBABLE CAUSE FOR THE SEARCH.

The officer did not make a mistake as to the time when he saw the gun "in plain view" as the court below stated (RT, page 100, line 23, through 28.)

At the suppression hearing the officer testified on four occasions that he saw the gun while outside the car. (RT, page 11, lines 25 through 28; page 31, lines 1 through 3; page 33 lines 2 through 27 and; page 25, line 6 through 9.)

It is clear that the officer intended to testify that he saw the gun while outside the vehicle, in order to justify the subsequent search, and simply fabricated his observation in furtherance of his attempt to legitimize the search.

The court below goes on to further speculate:

> "I THINK THE PREPONDERANCE OF THE EVIDENCE IS, *THAT THE GUN WAS IN THAT POUCH WITH ITS HANDLE SHOWING.*

THE OFFICER RECOGNIZED IT IMMEDIATELY AS A GUN. IF IT WASN'T, I THINK IT IS REASONABLE TO SUPPOSE THE OFFICER SAW THE OUTLINE OF THE GUN IN THAT POUCH AND REACHED IN AND CONFISCATED THE WEAPON. THAT IS WHEN THE OFFICER SAW THE GUN. NOT WHEN THE DOOR WAS CLOSED, BUT WHEN THE DOOR WAS OPENED." [Emphasis ours.] (RT, page 101, line 23 to page 102, line 3.)

This evidentiary finding of the court regarding the observation of the officer after the door was opened also gives rise to the question of whether the officer was justified in ordering Mr. Hennessy from the car. Though the law has evolved that on a traffic stop the party may be requested to exit the automobile, in this instance the only reason articulated to ask Mr. Hennessy to get out of the car was the observation of the gun, which the court found the officer could not have observed.

If Mr. Hennessy had not opened the door then the officer would not have seen the weapon.

The court below as quoted, supra, merely speculates as to what the officer might have seen *with the door opened*. First the court says the gun handle was showing and that if it wasn't showing then it was reasonable to suppose that the officer saw the outline of a gun in the pouch. There was no evidence to support either of these *suppositions*. The evidence was very clear that when a 38 caliber revolver with a six inch barrel was placed into the side pouch it could not be seen. To suggest that a handle or outline of a much smaller gun, 4 inches long and of 22 caliber, would be visible to the officer when the door was opened is not justified under the

facts of the case and testimony by the experts that was absolutely accepted by the trial court.

More importantly, there is absolutely no testimony to that effect, by the officer, ie. that he saw the gun after the door was opened but before he began searching.

The court to which a Penal Code §1538.5 motion is addressed sits as a finder of fact in determining the reasonableness of a search or seizure. Consequently, its express or implied findings of fact will be upheld on review by appeal if supported by substantial evidence. *People vs. Superior Court (Peck)*, (1974) 10 C3d 645.

In the case of *People vs. Lawler*, (1973) 9 C3d 156, at page 160 the court held;

> "... the trial court's conclusion ... should not lightly be challenged by appeal or by petition for extraordinary writ. Of course, if such review is nevertheless sought, it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness."

In this case the facts found by the trier , ie. that the officer could not see the gun from outside the car, are not disputed by the appellant. The *suppositions* stated by the trier are disputed since there is no evidence in support of said suppositions since the officer testified he saw the gun before the door was opened. The findings of the court below do not support the substantial evidence standard required for denial of the §1538.5 motion.

The evidence strongly suggests that the officer saw Mr. Hennessy driving an old Volkswagen vehicle and the officer, for some reason that he could not articulate, decided to stop and search the vehicle. To do so he states that a pair

of dice, that may or may not have existed, appeared to him to obstruct the view of the appellant. He then, in order to justify the search states that he sees something that the court found he could not see, ie. the gun from outside the vehicle.

The conclusion of the trial judge that the observation was made after the door was open was not based on evidence but upon conjecture, speculation and unwarranted inference.

The comments of the trial court regarding his conclusions are contained on page 7 of the Appellate Court decision as footnote 7. I incorporate said comments herein by reference.

The trial judge stated that:

> "... I just don't believe that the officer remembered correctly. He makes hundreds of these traffic stops and I am sure he just didn't remember correctly at this juncture where and under what circumstances he saw the gun."

There is no evidence that the officer had done "hundreds of these traffic stops" as apparently relied upon by the trial court to explain the contrary testimony of the officer. The only evidence in the record is that he had "done a number" of traffic stops prior to this occasion. (RT, page 20, lines 10 through 12.)

There is no evidence as to what his assignment was on the day of the stop. There is no evidence that he had made any traffic stops after that stop, on that day or ever. There is no evidence that he was ever assigned, as part of his duties, to make traffic stops.

The court had no basis to state that it believed the officer didn't remember correctly.

It appears from the record that Officer Kenny was

present during the expert testimony that established that he could not see what he said he saw. Even after hearing that testimony he still testified that he saw the gun from outside the car. (RT page 69, line 22 through page 70, line 11.)

The officer after hearing testimony that took thirty pages to report, and which established that he could not have seen what he saw, still maintained that he could see the gun from outside the car and with the door closed. If he had made an innocent mistake in his initial testimony then he certainly should have corrected his testimony when the opportunity presented itself.

There is nothing in the record that support the trial court's finding that lead to the denial of the Motion to Suppress Evidence. The supposition that the court utilized to support the search was arrived at through speculation, conjecture and unwarranted inference.

> "Sometimes, however, the evidence of guilt is so unsubstantial that the judgment may be regarded as having been based mainly on 'speculation,' 'conjecture,' 'unwarranted inference,' or 'mere suspicion,' and reversal is then required without regard to the presence of error in the record."
>
> *California Criminal Law, 2nd Edition, Witkin & Epstein*, Volume 6, §3208, page 3968.

The Appellate Courts ruling is a nothing more than a perpetuation of a violation of Mr. Hennessy's Fourth Amendment rights against unreasonable search and seizure in that it is obvious there was no credible probable cause for the search in this case.

B. THE CONDUCT OF THE APPELLANT WAS NOT FURTIVE.

The court in the exclusion hearing found that the officer was justified in asking Mr. Hennessy to exit his vehicle because he observed a furtive movement. (RT, page 101, lines 14, through line 22.) The officer observed no movement. He only observed that Mr. Hennessy's hand was down and out of his view. (RT, page 11, line 16 through 22.)

The only conduct of Mr. Hennessy was to take his hands off the steering wheel when he had come to a stop.

The case of *Pennsylvania vs. Mimms*, (1977) 434 U.S. 106, as cited by the court below, does not apply to this situation. In Mimms after a traffic stop for an expired license plate and officer asked the driver to exit and show him his owner's card and drivers license. Upon his exiting the officer observed a large bulge under his jacket and frisked him finding a revolver.

In the instant case the officer has articulated no reason other than the fact that he first observed the gun, which observation was found to be impossible, to ask Mr. Hennessy to exit the vehicle.

The court further justifies the search by citing *Texas vs. Brown* , (1983) 460 U.S. 730, wherein this Court held that an item, in plain view, may be seized if there is probable cause to connect it with criminal activity. In that case an officer observed a green knotted balloon dropped by the defendant.

The gun was never in plain view and found only when the officer searched the vehicle *without probable cause*.

One of the leading cases in California on furtive gestures is the case of *People vs. Superior Court (Kiefer), (1970)* 3 C.3rd 807. The court states that:

". . . in the typical traffic violation case: there, the

"circumstances justifying the arrest"--e.g., speeding, failing to stop, illegal turn, or defective lights--do not furnish probable cause to search the interior of the car.", page 614.

In *Sibron vs. New York*, (1968) 392 U.S. 40, this Court stated that in addition to furtive gestures one must find specific knowledge on the part of the officer relating the suspect to evidence of a crime, before the search can be conducted. In this case the court below gets the cart before the horse in that he finds the alleged furtive gesture to legitimize the later found evidence of the crime, ie. possession of illegal substance and a weapon.

It is also very interesting that although the stop in this case occurred at 11:40 in the morning, and though the officer did not recognize Mr. Hennessy nor did he resemble anyone the officer had contacted before, he approached the vehicle *with his gun drawn*. (RT, page 30, lines 17 through 27.) We submit that the conduct of the officer, under these circumstances, while conducting an investigation for, at best, an equipment violation is very suspect. It is clear that the officer had an unsubstantiated hunch and based on this hunch decided to stop Mr. Hennessy's vehicle to search it, without probable cause.

C. THERE WAS NO PROBABLE CAUSE FOR THE TRAFFIC STOP.

The arresting officer allegedly stopped Mr. Hennessy for a violation of § 26708, subdivision A, of the California Vehicle Code, (See appendix.) ie. having a pair of dice hanging from the rear view mirror that would obstructed the drivers vision. If said dice existed it is unexplained why the

arresting officer did not book the offending dice into evidence. If the officer had done so then the magistrate and we would have had some evidence before us to allow an objective determination whether the officer was reasonable in his belief that they could have obstructed the vision. We also could ascertain if in fact said dice existed.

In a traffic stop where one commits a "moving violation" the officers testimony is all that is generally available to establish the existence of the vehicle code violation. In this instance, an "equipment violation" the dice were the existence of real evidence which should have been seized and made available as part of the peoples evidence along with the contraband and weapon.

The officer made no determination after the stop if in fact said view was obstructed. (RT, page 21, lines 8 through 12.)

This failure to preserve the dice as evidence, if they existed, prevents Mr. Hennessy from testing the reasonableness of the officers decision to make the initial traffic stop.

In the light of the lower court's finding that the officer did not see what he testified to have seen, ie. the butt of the 22. caliber pistol from outside the car, the believability of the officer as to what he observed leading up to the traffic stop can be seriously questioned. If he had maintained custody of the dice at least there would have been some real evidence to verify his testimony regarding said stop.

III

THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, TO SUPPORT ITS AFFIRMANCE OF THE DENIAL OF THE MOTION TO SUPPRESS

CITES CALIFORNIA CASES THAT HAVE NO BEARING ON THE FACTS OF THIS CASE.

The Appellate Court cites a series of cases wherein circumstantial evidence was permitted to show a victims state of mine to support the finding that the officer actually saw the weapon when the door was opened. *People vs. Inguez*, (1994) 7 Cal.4th 847; *People v. Renteria* (1964) 61 Cal.2d 497 and; *People vs. Borra* , (1932) 123 Cal. App. 481, all cases which allowed circumstantial evidence to show state of mind of victims at the time of the commission of the crimes involved.

The court below used this rational as circumstantial evidence to clear up the disparity in Officer Kenny's testimony at the time of the hearing in the trial court.

The cases cited by the appellate court for their holding that circumstantial evidence of fear can be established by the nature of the crime have no application here. The three cases cited, are all instances where a factual situation is used to establish circumstantial evidence of the state of mind of a victim.

The state of mind of the officer is not relevant or material as to when he made his observations and what those observations were. He testified as to his observations and stuck to that testimony even though he had an opportunity to correct it after the experts had testified.

This is circumstantial evidence of what occurred; evidence which circumstantially and clearly establishes that this officer conducted an illegal search.

III.
THE TRIAL COURTS ACTION WAS IN ERROR AS THERE WAS NO PROBABLE CAUSE FOR THE SEARCH.

The starting point for inquiry in this area is the ruling of the trial judge. Could he substitute his rationalization instead of the police officers factual testimony? If it was a proper act was it still violative of the fourth amendment or otherwise a faulty decision impacting Federal constitutional concerns?

> "... in determining whether the seizure and search were "unreasonable" our inquiry is a dual one -- whether the officers' action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place" *Terry vs. Ohio*, 1968) 392 U.S. 1.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January 26, 1998

Respectfully submitted,

EDWARD M. DALEY
Counsel of Record for Petitioner
THOMAS WILLIAM HENNESSY

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,	) B088200
	)
Plaintiff and Respondent,	) (Super.Ct.No.
	) VA020149)
	)
v.	) COURT OF APPEAL
	) SECOND DIST.
THOMAS HENNESSY,	) FILED
	) AUG 14 1995 Defendant
and Appellant.	) Joseph A. Lane
	) Clerk
	)
	) Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Simpson, Jr., Judge. Affirmed.

Edward M. Daley, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Jaime L. Fuster

and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas William Hennessey appeals from the judgment entered following his pleas of guilty to possessing methamphetamine for purposes of sale, possessing a concealed firearm in a vehicle and possessing a loaded firearm in a vehicle, and after he admitted he was personally armed with a firearm when he committed the narcotic offense. (Health & Saf. Code, §11378; Pen.Code, §§ 12025, subd. (a), 12031, subd. (a); 12022, subd. (c)). The court denied appellant's motion to suppress illegally-seized evidence. (Pen.Code, § 1538.5.) He contends there was no reasonable cause demonstrated for the traffic stop and the officer had no justification for ordering appellant out of the Volkswagen and seizing a revolver and other containers from the Volkswagen's passenger compartment.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597), the evidence established at about 11:40 a.m. on December 29, 1993, Los Angeles County Deputy Sheriff Steven Kenny, an experienced deputy sheriff, saw appellant driving a 1967 Volkswagen which had a pair of two-to-three inch dice hanging from its rear view mirror.[1] Believing the dice obstructed appellant's view through his front windshield, a

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[1] The motion to suppress evidence was determined by the evidence adduced during a hearing in the superior court (Pen.Code, § 1538,5, subd. (i).)

violation of Vehicle Code section 26708, subdivision (a)(1), Kenny activated his red lights and pulled appellant over for the traffic violation.[2]

After appellant pulled over and stopped, Kenny approached the driver's window of the Volkswagen along the driver's side. As Kenny approached the door, Kenny saw appellant's hand leave the steering wheel. Appellant put his hand down towards the driver's door. Kenny concluded appellant's conduct might indicate he had something in his hand and was hiding something.[3] Kenny drew his service

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[2] During cross-examination, Kenny testified he was not entirely clear about the content of this provision of the Vehicle Code, although he knew it prohibited hanging anything from the mirror which obstructs the driver's view. Kenny also said his impression of the section was that nothing can obstruct the driver's view and the dice would have done so.

Vehicle Code section 26708, subdivision (a)(1) provides: "No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows." Additionally, subdivision (a)(2) of that section provides: "No person shall drive any motor vehicle with any object or material placed, displayed, affixed, or applied in or upon the vehicle which obstructs or reduces the driver's clear view through the windshield or side windows."

[3] Appellant cites this court to the preliminary hearing transcript where the deputy testified he ordered appellant to put his hands where the deputy could see them after the deputy observed appellant put his hand down to

revolver and "contacted" appellant. From the car's exterior, through the driver's window, Kenny noticed the handle of a small handgun protruding from the pouch in the driver's door near appellant's left hand. Kenny ordered appellant to get out of the car so he could safely recover the handgun. kenny put appellant into the rear of his patrol vehicle and returned to retrieve from the door pouch what turned out to be a loaded .22 caliber revolver with a two-inch barrel.

Thereafter, Kenny searched the Volkswagen for other "contraband." Inside the pouch, the deputy found a brown leather-type glasses case containing methamphetamine. On the driver's floorboard, the deputy found a black case containing empty plastic baggies. Appellant was arrested for a weapons charge and a narcotics charge.

During cross-examination, Kenny stated that the movement appellant made with his left hand upon approach was not consistent with rolling down the driver's window, but it was consistent with turning off the ignition, if the ignition had been on that side of the steering wheel, which it was not.[4]

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the left. During the hearing on the motion to suppress in superior court, no such testimony was introduced in evidence. Nor was the deputy impeached with this preliminary hearing testimony. The preliminary hearing testimony was not made part of the record of the motion to suppress evidence in the superior court by stipulation or otherwise. This court accordingly cannot consider any evidence presented at the preliminary hearing as it was not before the superior court. (See Pen.Code, § 1538.5, subd. (i).)

[4] Kenny testified he believed the ignition was on the right side of the steering wheel. Neither party provided any

Kenny said he saw the gun in the pouch from his position looking through the driver's window from the outside. Defense counsel showed the deputy photographs of the Volkswagen. Kenny said the photographs appeared to have been taken from a different perspective than from his view into the Volkswagen.

In defense, Jonathan Coyle, a private investigator, testified he attempted to see if he could see into the pouch from the exterior of the Volkswagen, but he could not see the pouch unless he put his head into the driver's window to the neck and then looked down. Coyle took photographs of the Volkswagen illustrating the deputy's perspective into the driver's area of the Volkswagen.

Louis Vasquez, another private investigator who previously was a Los Angeles County Sheriff for 33 years, testified he videotaped the view into the Volkswagen from the exterior. He also discovered it was impossible to see a six-inch revolver inside the pouch in the driver's door. The revolver could not be observed due to the presence of a door handle and the pouch closed over the revolver. Even with his head inside the window of the driver's door, he could not see the revolver.

Jerry Frishkorn, who for 20 years had been repairing and restoring Volkswagens, testified he was familiar with the pouch on the inside of the driver's door of a 1967 Volkswagen. The pouch is five to six and a half inches deep and about 12 inches long. Frishkorn opined the pouch could not ben seen from outside the door. To see the pouch, one has to put one's head inside the window, regardless of whether

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further evidence as to the location of the Volkwagen's ignition.

or nor the pouch was protruding from the door. Frishkorn also opined it would be impossible for the deputy to have determined an object handing from the rear view mirror obstructed the driver's view by looking through the rear window of the Volkswagen from 40 feet away.

In rebuttal, Kenny testified the revolver he recovered was about four inches in length. Kenny did not seize the pair of dice as evidence and he left them hanging where they were inside the Volkswagen. Kenny issued no citation for the Vehicle Code violation. Kenny testified the driver's door panel was in a different condition than depicted in the videotape and he believed the Volkswagen appearing in the videotape was not the same Volkswagen appellant was driving. The pouch was in appellant's Volkswagen not in good condition. Kenny was standing where the driver's door an door frame met when he saw the revolver. The staples at the bottom of the pouch were loose; that portion of the pouch was folded back against the metal portion of the door and leaning "back that way." The door panel was open to the Volkswagen's interior . The brown glasses case was in plain view once the door was opened since the bottom part of the pouch had "broken away."

After the People and defense rested, the prosecutor urged the deputy had authority to stop the Volkswagen for the traffic violation. When the deputy observed the butt of a gun protruding from a pouch inside the vehicle during the stop, he had authority to enter the car and remove the gun and to search for further weapons and contraband. The prosecutor urged the same Volkswagen was not used during the videotaping and the defense produced no photograph of the pocket of the actual Volkswagen in question here. The issue during the motion was credibility.

Defense counsel urged the photographs accurately

depicted the Volkswagen appellant was driving, and the Volkswagen appellant was driving was no longer available.[5] The defense conceded a different Volkswagen was used for videotaping, but argued all 1967 Volkswagen were identical. Defense counsel argued the deputy could not have determined from his perspective 40 feet behind the Volkswagen that the pair of dice obstructed the driver's view and thus had not reasonable cause to make a traffic stop. The defense investigators and Volkswagen expert testified the pouch could not be seen from the perspective at which the deputy claimed he saw the revolver and thus the request to alight and search of the Volkswagen's interior was not justified.

The court denied the motion to suppress evidence. The court commented the detention was justified by the deputy's observation of a pair of dice hanging from appellant's rear view mirror, which reasonably might have been obstructing appellant's view, and there was no pretext stop.[6] The court said the deputy apparently did not remember the circumstances under which he first observed the revolver,

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[5] No photograph of the interior of the door of the Volkswagen appellant was driving when he wa stopped was introduced into evidence. Also, there were no photographs of the pair of dice which were hanging from the Volkswagen's rear view mirror.

[6] The court said: "[T]here is nothing in the record to indicate that there was any other reason for the officer to have stopped this car. The officer was not surveilling the car. There was no evidence that there was any erratic driving."

which was understandable as the officer stopped so many motorists in the course of his employment. The court did not believe the deputy observed the revolver from the car's exterior. What the court deemed dispositive was that the deputy reasonably concluded he had observed appellant make a furtive gesture as the deputy approached and, for the reason, the deputy asked appellant to get out of the Volkswagen. The court believed, when the driver's door opened, the revolver was in plain view and its handle was protruding from the pouch or the deputy could see the outline of the revolver inside the pouch.[7] The deputy was justified in seizing the

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[7] The court commented: "One of the experts called by [appellant], ... [¶] had a picture taken of himself looking in the door as far as it was necessary for him to put his head in order to see that [door[panel. And I think he was into the door panel about up to his chin or maybe to the point of his neck. [¶]
Looking at the photographs, I just don't believe that the officer remembered correctly. He makes hundreds of these traffic stops and I am sure he just didn't remember correctly at this juncture where and under what circumstances he saw that gun. I don't believe the he saw the gun in the panel of the car. [¶] But that conclusion is not dispositive of the question of whether what the officer proceeded to do was any impingement on the Fourth Amendment. It is well settled in Fourth Amendment law that on a traffic stop, an officer may ask the driver to exit the vehicle.... [¶] Now, in the view of this court of the evidence, that is when the officer saw the gun. Not when the door was closed, but when the door was opened. [¶] I think the preponderance of the evidence is the the gun was in that pouch with its handle showing. The officer recognized it immediately as a gun. If

revolver upon observing it, principally for the deputy's safety, and in searching the Volkswagen's passenger compartment and opening any containers found therein.

DISCUSSION

I. FAILURE TO SEIZE THE PAIR OF DICE AND JUSTIFICATION FOR THE DETENTION.

The contention there was no reasonable cause for the traffic stop and the officer had an obligation to seize the pair of dice as evidence of the traffic violation lacks merit.

There is no flaw in the court's ruling as a result of the deputy's failure to seize the pair of dice or make a later determination appellant's vision was in fact obstructed by the pair of dice hanging from the rear view mirror. "A police officer may legally stop a motorist he suspects of violating the Vehicle Code for the purpose of issuing a citation." (*People v. Grant* (1990) 217 Cal.App.3d 1451, 1458, citing *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 200.) The deputy testified he observed the Vehicle Code violation and stopped the Volkswagen for that reason. The pair of dice hanging from the rear view mirror was a violation of Vehicle Code section 26708, subdivision (a)(1), as the dice were

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it wasn't, I think it is reasonable to suppose the officer saw the outline of the gun in that pouch and reached in and confiscated the weapon. [¶] ....the officer is perfectly within his right to take possession of the weapon and to examine it. Principally for the officer's safety. And in doing so, there is no Fourth Amendment violation."

objects "applied" on the windshield or, under subdivision (a)(2), or the deputy reasonably concluded the pair of dice had the effect of "obstruct[ing]...the driver's clear view through the windshield...." The traffic stop was amply justified.

The deputy was not required to seize the pair of dice as evidence for the suppression hearing. (*People v. Webb* (1993) 6 Cal.4th 494, 519-520.)

II. REASONABLE CAUSE TO ORDER APPELLANT FROM THE VEHICLE AND CAUSE TO SEARCH THE PASSENGER COMPARTMENT.

The related contentions there was no "furtive movement" by appellant permitting the deputy to order appellant from the Volkswagen and no cause for the search similarly lacks merit.

It is settled that once a motor vehicle has been lawfully detained for a traffic violation, a police officer amy order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 111, fn. 6.)

Furthermore, the search of the passenger compartment of a suspect's car during an investigative detention is reasonable where the officer, acting as a reasonably prudent person, is warranted in the belief that his safety is in danger. (*Michigan v. Long* (1983) 463 U.S. 1032, 1035-1036.)

Here, the deputy had justification without the observation of any furtive movement to order appellant out of the car and request and examine his driver's license and issue a citation. The court determined that was what the deputy did. It was then that the deputy observed the handle of the gun. These circumstances warranted the deputy in believing

appellant was armed and presently dangerous and the officer was further warranted in checking the passenger for further weapons and further evidence relating to the concealed and loaded handgun.

III. THE COURT'S RULING.

The contention there was no substantial evidence support the court's denial of the search and seizure motion since the deputy unequivocally testified he observed the revolver in plain view once he opened the door also lacks merit.

The court, as the trier of fact, was entitled to find the deputy made the observations he obstinately stated he had, but from another position. The deputy also indicated in his testimony he had a clear vision of seeing the handgun with its handle sticking out of the pouch on the interior of the driver's door. The court determined that the evidence of that clear vision was circumstantial evidence establishing the deputy had seen the weapon soon after he confronted appellant but at a time he could observe the revolver from a lawful and an unobstructed position. That would have been when the deputy ordered appellant from the Volkswagen to write a citation or after fearing for his safety due to the furtive gesture. That circumstantial evidence is sufficient to uphold the trial court's determination the deputy actually saw the weapon from the interior once he asked appellant to alight from the Volkswagen. (Cf. *People v. Iniguez* (1994) 7 Cal.4th 847, 857 [fear established in a rape case by circumstantial evidence]; *People v. Renteria* (1964) notwithstanding superficial contrary testimony from the victim]; *People v. Borra* (1932) 123 Cal.App. 482, 483-485 [fear in robbery established by the evidence when the

circumstances of the robbery cause for fear].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

LILLIE, P.J.
WOODS (Fred), J.

APPENDIX B

Second Appellate District,
Division Seven,
No. B088200
S049030

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent
v.

THOMAS HENNESSY, Appellant

SUPREME COURT
FILED
NOV - 1 1995

Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX C

APPENDIX C

EXCERPTS FROM REPORTER'S TRANSCRIPT

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department Southeast N

Hon. C. Robert Simpson, Judge
No VA 020149

People of the State of California

vs.

Thomas Hennessy

July 26, 1994
July 27, 1994

R.T., Page 10, Line 17 to Page 11, Line 2.

* * *

BY MR. MARTINEZ: Q. And what was the purpose for stopping the defendant's vehicle?

A Had some dice hanging from his mirror obstructing his view.

Q And that is a violation of , as far as you know of the vehicle code is it not officer.

A Yes sir.

Q Is that Vehicle Code 26708, Subdivision (a), subdivision (1)?

A Yes sir.

* * *

[R.T., Page 11, Line 16, Page 12, Line 9.]

* * *

BY MR. MARTINEZ: Q. And as you approached the defendant's vehicle on the driver's side did you observe anything inside the vehicle which drew your attention?

A Yes sir.

Q And what was that, sir?

A Initially the driver's left hand was out of my view like he was hiding something.

A Yes and continue.

A And then, as I contacted the driver, I looked down to where his hand was, and I noticed a small handgun protruding from the - - like a pouch that's in a Volkswagen door.

Q And what did you proceed to do then?

A I ordered the defendant to exit his vehicle so I can safely recover the gun.

Q And can you describe the gun to the court?

A It was a small .22 caliber handgun.

* * *

[R.T. Page 20, Lines 10 - 12.]

* * *

Q And you have done a number of vehicle stops before?

A Yes, Sir

* * *

[R.T., Page 21, Lines 8 - 11.]

* * *

Q After you made the stop on my officer - - excuse me - - on my client, did you ever sit in the car to determine if the view was obstructed by the dice?

A No.

* * *

[R.T., Page 30, Line 16, to Page 31, Line 3.]

* * *

Q All right. Now, you drew your gun at some point, did you not?

A That's correct.

Q And you approached the vehicle with the gun drawn?

A That's correct.

Q And pointed a -- pointed it at my client/

A I don't believe it was actually pointed at him at that time.

Q Which direction was your gun pointed?

A Probably up, the gun.
Q Okay. Now as you walked up, you said, "I saw the - - the gun in the compartment;" is that correct?
A Yes.

[R.T., Page 31, Lines 1-3.]

* * *

Q Now as you walked, up you said, "I saw the - - gun in the compartment;" is that correct?
A Yes

[R.T., Page 33, Lines 3-22.]

* * *

Q Your testimony is, as I recall from the preliminary hearing and from today, that you observed the handgun in the door pouch when you were up against the vehicle, to the rear of the driver; is that correct?
A Yes , sir.
Q Ok. And you can see -- you saw the gun in plain view at that point; correct?
A Correct.
Q All right. And you didn't stick your head into the vehicle to see the gun, did you?
A No, Sir.
Q All right. So it was from this position that you saw the gun?
A Generally, but not exactly.
Q In plain view?
A Yes.

* * *

[R.T., Page 34, Line 24, to Page 35, Line 9.]

* * *

By MR. MARTINEZ:
Q Officer, that Exhibit F shows the door closed: is that correct?
A That's correct.
Q Now, was the door open at some time?
A Not as I approached the car, no.
Q But as you approached the car - - well, when was the door open, the driver's door?
A When I had the driver exit the car.
Q All right. And -- but this is at a point that you had already seen the gun handle of the gun; is that correct?
A That's correct.

* * *

[R.T, Page 35, Line 6 - 9.]

* * *

Q And - - But this is at a point that you had already seen the gun handle; is that correct?
A That's Correct.

* * *

[R.T., Page 51, Line 12, to page 52, Line 28]

* * *

(Witness is Mr. Vasquez an expert called by defendant.)
My partner here has started to take those pictures there, and now we will be moving to the front, to the left side of the Volkswagen where I am standing there with a 30 - - .38 caliber, six-inch revolver. And I'm making sure that

the weapon is unloaded, as you can see, the pouch behind me there at that point.

I'm showing my partner here that the weapon is unloaded. I'm going back to the door here, and I/m placing the revolver into the pouch and the pouch closed on it, and the door is open at this particular time. Close it.

And show that stepping up to the -- close to the vehicle, you cannot see it. Here he comes with the video camera approaching the left window there looking in. And he's got the video camera as high as he can get it to look into the interior of the vehicle to the left side of the door there.

Again, I opened the door there so you can see that. And taking the weapon out, I have reversed it. Now, I am taking and I reverse it in the direction and place it back inside the pouch with the cannon face down.

This is an armrest right in here which makes it a little more difficult. It looks toward the pouch.

Now, I have taken and I turned the weapon upside down and placed it back inside the pouch. The pouch closes on the door. You cannot see the weapon, and this is a six-inch revolver

If it was a smaller caliber weapon, you're unable to see it at all just like you can't see this one because the pouch swings shut, up against the door.

Now, my partner walks around over to the passenger side and will film from there showing where I have closed the door. And you cannot see the weapon. You can't see the butt of the gun or even the barrel of the gun.

Now, in order for me to be able to see it, as it will be shown here in the film in a few seconds, you will see me stick my head inside the vehicle, and you cannot see the

weapon.

Here I am pointing there towards the pouch indicating that it's in the pouch. It's closed on the weapon. You can't see it.

* * *

[R.T., Page 59, Lines 2-18.]

* * *

MR. RIOS: I'm Sorry.

Q Are you familiar with the pouch in a Volkswagen Door, 1967 Volkswagen Door?

A Yes.

Q All right. You're familiar with the dimensions of that pouch?

A Yes.

Q Can you tell the court approximately how deep that pouch is?

A It's about six, six and a half inches deep.

Q Okay. Can you tell the court how long that pouch is?

A About a foot.

Q All right.

A 12 inches.

* * * *

[R.T., Page 68, Lines 3-23.]

* * *

(Questions of arresting officer on rebuttal by defendant.)

Q Officer, as I recall your testimony this moving you said that you seized a small .22 caliber revolver handgun

from my client; is that correct?

A Yes.

Q And as I recall your testimony you said the approximate length of that weapon was approximately four inches; is that correct?

A I believe so.

Q All right. Now, I notice that certainly you've had a lot of discuss about this dice. You did not cite my client for the vehicle-- vehicle code violation involving this dice, did you?

A No.

Q All right. Did - - you issued no ticket for the dice?

A No, sir.

Q All right. Did you -- did you seize the dice to preserve that for evidence after you arrested my client?

A No, sir.

* * *

[R.T., Page 69, Line 22, to Page 70, Line 11.]

* * *

BY MR. MARTINEZ

Q Officer Kenny, you've heard the testimony that it's impossible for anyone to see what's in that pouch.

You testified that you did see something in that pouch. Will you describe to the court the exact position that you were in,, one; No 2, the position of that gun in relation to the pouch and the condition of the pouch when you first saw it?

A Sure. I was standing right at the point of the car where - - the door meets - - the frame of the vehicle where the door comes together. The gun was in the front portion of the pouch. And the condition of the pouch, was the

bottom part of the pouch had - - there's staples that hold that pouch against the - - against the particle board, that's the door handle.

The bottom part of that, the staples of the glue had come loose and that portion had folded back against the metal portion of the door. Not quite all the way, but it was leaning back that way..

* * *

[R.T. Page 100, Lines 10-14.]

* * *

THE COURT:

I am going to find that the preponderance of the evidence in this case is that the officer could not see the gun in the pouch on the left panel of the car unless the officer put his head into the car, which he testified he did not do.

* * *

[R.T. Page 101, Line 14, to page 102, Line 3.]

* * *

I believe the preponderance of the evidence is with the officer on that. I believe that what the defendant is stated to have done with his left arm could have been interpreted otherwise.

But I thing the officer drew a reasonable conclusion that what he saw the defendant do was furtive. And that gave further substantiation to the right of the officer to ask Mr. Hennessy to exit the vehicle, which he did.

Now, in the view of this court of the evidence, that is when the officer saw the gun. Not when the door was closed, but when the door was opened.

I think the preponderance of the evidence is that the gun was in that pouch with its handle showing. The officer recognized it immediately as a gun. If it wasn't, I think it is reasonable to suppose the officer saw the outline of the gun in that pouch and reached in and confiscated the weapon.

APPENDIX D

28 U.S.C.A.

§ 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Health & Safety Code

§ 11378. Possession for sale; punishment

Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses for sale any controlled substance which is (1) classified in Schedule III, IV or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22) and (23) of subdivision (d), (3) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (4) specified in subdivision (d),(e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055, shall be punished by imprisonment in the state prison.

California Penal Code

§ 1538.5 Motion to return property or suppress evidence

(a) [Grounds.] A defendant may move for the return of property or t suppress as evidence any tangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

§ 12025. Carrying weapon concealed within vehicle or on person; offense; arms in holster or sheath

(a) A person is guilty of carrying a concealed firearm when he or she does any of the following:

(1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person.

§ 12031. Carrying loaded firearms; misdemeanor; punishment; exceptions

(a)(1) *** Every person who carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor;

§ 12055.5 Firearms; use in commission, or attempted commission of felony; discharge at occupied motor vehicle causing great bodily injury or death; controlled substances violations; additional penalties; disposal of firearm

(a) (1) Except as provided in subdivisions (b) and (c), any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years, unless use of firearm is an element of the offense of which he or she is convicted. ***

California Vehicle Code

§ 26708 Material obstructing or reducing driver's view; installation, affixation or application of transparent material

(a)(1) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows.

(2) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied in or upon the which was obstructs or reduces the driver's clear view through the windshield or side windows.

(3) This subdivision applies to a person driving a motor vehicle with the driver's clear vision through the windshield, or side or rear windows, obstructed by snow or ice.